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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

No. 75-267

RALPH STEPHENS ..... PETITIONER

V.

COMMONWEALTH OF KENTUCKY ..... RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

ED W. HANCOCK
ATTORNEY GENERAL

CARL T. MILLER, JR.
ASSISTANT DEPUTY
ATTORNEY GENERAL
Capitol Building
Frankfort, Kentucky 40601

COUNSEL FOR RESPONDENT

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OPINION BELOW

The opinion of the Court of Appeals of Kentucky, reported in 522 S.W.2d 181 (1975), is printed as Petitioner's Appendix A.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

WHETHER OR NOT THE COURT OF APPEALS OF KENTUCKY ERRED IN ITS OPINION APPROVING THE ACTION OF THE TRIAL COURT IN PERMITTING THE INTRODUCTION INTO EVIDENCE OF THE WATCH AND TWO RINGS SEIZED PURSUANT TO THE SEARCH WARRANT WHEN THE WATCH AND TWO RINGS WERE NOT DESCRIBED IN THE SEARCH WARRANT BUT WERE IN "PLAIN VIEW"?

CONSTITUTIONAL AMENDMENT INVOLVED

The Fourth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct.

STATEMENT OF THE FACTS

Agreed Statement pursuant to Kentucky RCr 12.72. (Petitioner's Appendix F).

ARGUMENT

THE COURT OF APPEALS OF KENTUCKY DID NOT ERR IN ITS OPINION APPROVING THE ACTION OF THE TRIAL COURT IN PERMITTING THE INTRODUCTION INTO EVIDENCE OF THE WATCH AND TWO RINGS SEIZED PURSUANT TO THE SEARCH WARRANT WHEN THE WATCH AND TWO RINGS WERE NOT DESCRIBED IN THE SEARCH WARRANT BUT WERE IN "PLAIN VIEW."

Respondent submits the seizure was permissible under the doctrine of "plain view."

The police were in petitioner Stephens' home in obedience to a search warrant. The warrant described numerous items of personal property including "rare type coins ranging from pennies to silver dollars." (Petitioner's Appendix E). While carrying out the search, various items, such as expensive silverware, jewelry, stereo equipment, luggage and large amounts of costume jewelry were observed throughout the house. (Petitioner's Appendix F, Exhibit # 5, p. 22).

The three seized items were in a metal box which was located upstairs behind a hole cut in the wall, stuck over the rafters. When opened the metal box contained a number of watches, rings, knives and coins. (Petitioner's Appendix F, Exhibit #5, p. 16). The metal box and the contents thereof were seized.

The primary requisite for the "plain view" doctrine is that the officer has a right to be where he observes evidence in plain view. For application of the doctrine, the discovery must be inadvertent, that is the police not know in advance that they will find the particular item or items. *United States* v. *Cooks,* 493 F.2d 668 (7th Cir. 1974); *United States* v. *Garotto,* 476 F.2d 1009 (6th Cir. 1973); *United States* v. *Smollar,* 357 F.Supp. 628 (S. Dist. N.Y. 1972). Mr. Justice Stewart in *Coolidge* v. *New Hampshire,* 403 U.S. 443 at 466, 29 L.Ed.2d 564, 91 S.Ct. 2022, wrote:

> "The doctrine serves to supplement the prior justification, — . . . — and permits the warrantless seizure. Of course, the extension of the original justification is legitimate only where it is immediately apparent

to the police that they have evidence before them;"

The officer, in obedience to the warrant had a right to reach into the hole, remove the box and to open it. Coins were listed in the warrant and it was reasonble to think the box might contain coins, as indeed it did. Cf. *United States* v. *Gray,* 484 F.2d 352 (6th Cir. 1973) cert. den. 414 U.S. 1158. The discovery of 27 men's wristwatches, 38 wristwatches, 7 pocket knives, 7 men's rings, 22 ladies' rings, 6 gold chains, 5 watchbands, 1 gold belt buckle, 45 pennies and 37 pieces of foreign coins, copper, brass and silver was inadvertent. (Petitioner's Appendix F, Exhibit #5, pp. 18, 20).

The officer, testifying at the suppression hearing, stated he:

> ". . . knew that they was probable stolen — I knew the way those items were concealed, the amount of them, they was something wrong with them." (Petitioner's Appendix F, Exhibit #5, p. 20).

It was immediately apparent to him that this represented evidence, especially when the box contained coins and coins were listed in the warrant. *Coolidge,* supra.

Police, lawfully present, are not required to close their eyes and walk out and leave items believed stolen.

Petitioner points out that none of the property described in the search warrant was seized by the officers. However, even if the item described in a warrant is not found, seizure of other items is not necessarily unlawful. *United States* v. *Various Gambling Devices,* 478 F.2d 1194 (5th Cir. 1973).

CONCLUSION

Respondent submits the police were there legally, that they had a right to be where the items came into plain view inadvertently and that it was immediately apparent the items constituted evidence. The seizure was lawful and the Court of Appeals of Kentucky did not err in its opinion, therefore respondent respectfully requests this Court to deny the petition, because the opinion of the Court of Appeals of Kentucky was correct in that petitioner was not deprived of his Fourth Amendment rights.

Respectfully submitted,

ED W. HANCOCK
ATTORNEY GENERAL

/s/ Carl T. Miller, Jr.
ASSISTANT DEPUTY
ATTORNEY GENERAL
Capitol Building
Frankfort, Kentucky 40601

COUNSEL FOR RESPONDENT

PROOF OF SERVICE

I, Carl T. Miller, Jr., one of counsel for respondent, hereby certify that the foregoing Brief was served on petitioner by depositing three copies of same in the United States mail, first class postage prepaid, on September 16, 1975, addressed to Hon. Lewis A. White, White & Peck, 26 Broadway, Mt. Sterling, Kentucky 40353, Counsel for Petitioner.

Carl T. Miller, Jr.
Assistant Deputy Attorney General
Commonwealth of Kentucky

Counsel for Respondent